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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Appellant, v. ERIC S. CABALLERO, Defendant and Respondent.	B206606 (Los Angeles County Super. Ct. No. VA087789)

APPEAL from an order of the Superior Court of Los Angeles County, Dewey Lawes Falcone, Judge. Dismissed. yyy

Steve Cooley, District Attorney, Natasha S. Cooper, Patrick D. Moran and Roberta Schwartz, Deputy District Attorneys, for Plaintiff and Appellant.

Janice Fukai, Alternate Public Defender, Reid Honjiyo and Barbara McDaniel, Deputy Alternate Public Defenders, for Defendant and Respondent.

I. INTRODUCTION

Pursuant to Penal Code[1] section 1238, subdivision (a)(8), the prosecution appeals from the trial court's January 11, 2008, order dismissing the charge of murder in count 1 of the information (§ 187, subd. (a)) pursuant to section 1385, subdivision (a) following a mistrial. We conclude there is clear evidence the trial court intended to dismiss count 1 for legal insufficiency. The prosecution concedes that if there is clear evidence the trial court intended to dismiss for legal insufficiency, the dismissal order is not appealable. We therefore dismiss the appeal.

II. FACTUAL BACKGROUND

Derrick Gonzalez knew defendant, Eric S. Caballero, through high school. Mr. Gonzalez "hung out" with defendant after they left high school. However, Mr. Gonzalez stopped associating with defendant. Mr. Gonzalez stopped their association because of the effects of drug use on defendant's actions. Mr. Gonzalez acknowledged he had used marijuana and crystal methamphetamine. Defendant spent the night at Mr. Gonzalez's home on March 2, 2005. Mr. Gonzalez's laptop computer was missing. Defendant indicated he knew where it was located and would help get it back. However, at approximately 4 a.m., defendant left with some friends in an Astro van. Initially, defendant said he would get his cellular phone from his friends, who had parked the van down the street. However, defendant jumped on the passenger door of the van. The van drove a short distance, defendant got inside, and they drove away.

Later that morning, Mr. Gonzalez went to defendant's house. When Mr. Gonzalez knocked on the front door, no one answered. Mr. Gonzalez looked into the house through the kitchen window. Defendant was inside with a few men and one woman. Mr. Gonzalez then went to the window of defendant's younger brother. However,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

defendant's younger brother would not open the door. Mr. Gonzalez waited in his car before returning to the front door. Two men came outside and told Mr. Gonzalez to leave. These two individuals left in a black Mercedes. Mr. Gonzalez waited in his car approximately 30 minutes. The same individuals that had left in the Mercedes returned in a blue Astro van with additional men. The men in the van signaled to Mr. Gonzalez to leave. The van was parked down the street and the men got out. Mr. Gonzalez went to a neighbor's house to summon the police. The neighbor said a deputy sheriff was already present. The deputy was in the neighbor's home. The deputy escorted Mr. Gonzalez out of the neighborhood. Mr. Gonzalez later called the police. Mr. Gonzalez told the officers about what occurred at defendant's home and gave them descriptions of the black Mercedes and blue Astro van.

On the morning of March 4, 2005, defendant, Eugene Silos, Alberto ("Albert") Martinez, and Mayra Huitron were driving around in the blue Chevrolet Astro van. The van was owned by Mr. Martinez. Mr. Martinez was found to be an unavailable witness. His preliminary hearing testimony was read to the jury. The four had been up all night using methamphetamines. Defendant directed Mr. Martinez to the home of Patricia Henriquez and her husband Nelson Cardoza, in La Mirada. Ms. Henriquez and Mr. Cardoza were defendant's aunt and uncle respectively. Mr. Cardoza's 86-year-old grandmother, Adelina Garcia, and his 14-year-old daughter, Katherine Cardoza[2], also lived there. As will be noted, Ms Garcia is the homicide victim identified in count 1 of the information. The group intended to take showers, "kick back" and have something to eat. Mr. Martinez parked the van across the street from the Cardoza residence. Defendant got out of the van and walked to the front door. Defendant either opened the door or was allowed inside by someone. After approximately 20 minutes, Mr. Martinez became impatient. Mr. Martinez got out of the van and knocked on the front door. While looking through the small glass portion of the door, Mr. Martinez saw what he believed to be two individuals inside. Defendant seemed to be "getting off somebody" in Mr.

[2] Ms. Cardoza will hereafter be referred to as Katherine for purposes of clarity.

Martinez's words. Defendant came to the door, but did not open it. Defendant told Mr. Martinez to wait in the van.

Mr. Martinez went back to the van and spoke to Mr. Silos. Mr. Martinez, Mr. Silos, and Ms. Huitron were all becoming impatient while defendant was inside the Cardoza residence. Mr. Martinez waited a short while before returning to the house. When Mr. Martinez approached the house, he heard moaning sounds coming from inside. Mr. Martinez went to the window to the left of the front door. Defendant looked through the blinds of the window. Defendant again told Mr. Martinez to wait in the car. Mr. Martinez returned to his car. Mr. Martinez believed defendant might be having sex with someone inside. Mr. Martinez again went toward the front door. As he approached, defendant opened the door. Mr. Martinez then spoke to defendant. At the preliminary hearing, Mr. Martinez testified: "I asked him why he was acting like a punk, not me but especially his friends -- I was pointing towards my vehicle – because they were sitting in there. I asked why he was acting like that. . . . He replied, you know. And I told him, no, I don't know." Mr. Martinez noticed a "reddish," "saliva-type" liquid on defendant's right shoe. Mr. Martinez believed the substance might be semen. Defendant was asked if he was having sex. Defendant responded, "No - - well you know." Defendant tried to close the door on Mr. Martinez. Mr. Martinez then hit defendant in the face. Defendant closed the door. Mr. Silos had also started to approach the house. Mr. Silos and Mr. Martinez returned to the van and drove away.

Mr. Silos was dropped off at his home. After showering, Mr. Silos drove a black Mercedes to a Starbucks. Mr. Silos was arrested at the Starbucks for burglary tool possession. Mr. Silos told the detectives about having gone to the house in La Mirada. Mr. Silos also told the police where Mr. Martinez might be located.

Katherine left for school at 7:30 a.m. on March 4, 2005. Katherine's great grandmother, Ms. Garcia, was at home at 7:30 a.m. Ms. Garcia was always home to let Katherine inside after school. Katherine used a special door knock. Ms. Garcia's biggest fear was that someone would come into the residence. Ms. Garcia never opened the door for someone she did not know. When Katherine arrived home at approximately 4 p.m. on

March 4, 2005, no one answered her knock on the front door. Katherine went to the side patio door. However, the gate was locked. Katherine called out to Ms. Garcia. Katherine then went to the garage side of the house where she found another gate unlocked. Katherine found a door to the living room partially open. When Katherine came inside, her dog rushed toward her. Katherine found food everywhere in the kitchen as though Ms. Garcia had been cooking. Ms. Garcia's shoe was in the middle of the floor.

Katherine continued through the house in an effort to find Ms. Garcia. Katherine heard water running and music playing. Katherine opened the door to Ms. Garcia's room. Katherine saw: "chaos"; a chair had been turned over; several stools had been turned over; blood on the floor and the bed; the bedding was no longer on the bed; the legs of one of the stools were on the bed; and a bundle of blankets were wrapped up near the bathroom. Katherine believed Ms. Garcia's body was inside the blankets. Ms. Garcia's room was typically perfectly neat with everything in its place. Katherine ran to the living room to phone her mother. Katherine was unable to reach her mother. Katherine then telephoned her father. Mr. Cardoza told Katherine to check to see if Ms. Garcia was breathing. Although Katherine was afraid to do so, she pulled back the blanket, exposing some skin. Katherine told her father to come home immediately. Katherine took her dog and went outside. Mr. Cardoza called Katherine and told her to call the police, which she did. Katherine remained on the phone with the emergency operator until sheriff's deputies arrived. A recording of the emergency call was played for the jury at trial. Katherine recalled telling the deputies that defendant was someone with whom her family might have had a problem. Defendant was last in Katherine's home on the prior New Year's for a family reunion.

Mr. Cardoza received the telephone call from Katherine as he was leaving work on March 4, 2005. When he arrived home, he found Katherine with sheriff's deputies. Mr. Cardoza had normally parked his Dodge Ram pickup truck alongside the house at the curb. The keys for that truck were kept on a hanger next to the phone in the kitchen. When Mr. Cardoza arrived home, the Dodge truck and the keys were missing. Once they

were allowed to go inside the house early the following morning, Mr. Cardoza noticed his gun case was open on the floor of the master bedroom and two of his guns were missing. One gun was a Colt .45 Mark IV combat commander semiautomatic handgun. The other was a Tech 22, 30-round gun that looked like an Uzi machine gun with a banana clip. Mr. Cardoza kept the guns locked in his bedroom. Mr. Cardoza did not give anyone permission to take his guns. A third gun was still in the closet.

An autopsy performed on Ms. Garcia revealed that she died of blunt force trauma. Ms. Garcia's injuries included: a fractured skull; hemorrhaging around the brain; broken bones in both forearms; bruising around her eyes, lips, and jaw; lacerations on her face; a laceration measuring five and ten-sixteenths inches by three and five-sixteenths inches on the left side of her head; and a laceration measuring two and one-quarter inches by one and one-half inch on her left ear; severe bruising on both hands and wrists consistent with attempts to ward off a blow; bruising measuring four and one-half inches by two and one-half inches on her left shoulder; and a bruise measuring thirteen inches by three and three-quarter inches on her left arm. It appeared the injuries to Ms. Garcia's head were caused by a blunt object. Such blunt force trauma caused sufficient bleeding around her brain to ultimately result in her death. Ms. Garcia's death was not instantaneous. The broken bones in Ms. Garcia's forearms and bruises on her hands were likely caused by being struck by a blunt object. The bruises on Ms. Garcia's hands were almost black. The hemorrhaging in Ms. Garcia's brain as well as bleeding in her arms and other areas of the body was indicative that she was still alive when the blows were inflicted.

Deputy Lillian Peck arrived at the Cardoza residence at 4:10 p.m. on March 4, 2005. Deputy Peck noted that the victim's bedroom was "ramshackled" and there was furniture everywhere. Deputy Peck saw blood splatter everywhere. It looked to Deputy Peck that a "big fight" had occurred at the residence. Deputy Peck was told Ms. Garcia was dead. There were pools of blood on: Ms. Garcia's clothing; the bedding she was laying upon; the furniture next to her body; and the floor. Deputy Peck saw blood on the legs of one of the stools in the room. The victim's shoe was found in the kitchen.

Maria Rosario Medina lived approximately 10 houses away from the Cardoza home. On March 4, 2005, Ms. Medina drove past the Cardoza house at approximately 2 p.m. Ms. Medina did not see the gray pickup truck that was normally parked outside the garage at the home. When Ms. Medina passed by the house again at 3 p.m., there were no cars in the driveway of the house. Ms. Medina drove past again at 4 p.m. Ms. Medina saw a young girl holding a cat or dog in her arms outside the house. Ms. Medina saw a gray Ford with two Latinos inside looking at the house while driving slowly past. The driver was between 21 and 22 years old. The passenger was approximately 19 or 20 years old.

Jorge Campos knew defendant from high school. Mr. Campos "hung out" with defendant every day in 2005. Mr. Campos also knew Mr. Silos and Mr. Martinez. But Mr. Campos did not consider them his friends. Defendant was with Mr. Martinez during the week of March 4, 2005. Defendant came to Mr. Campos's house on March 4, 2005, at approximately 2 or 3 p.m. Defendant had a black bag containing two firearms. One firearm was a handgun, the other an Uzi automatic gun. Defendant left with Mr. Campos at approximately 4:30 or 5 p.m. They drove away in Mr. Campos's girlfriend's car, a gray Ford Focus. Defendant and Mr. Campos went to sell the guns. Defendant received money for one of the weapons, but the other was "stolen" or "taxed" by the buyer. Thereafter, Mr. Campos rented a room for defendant at the Quality Inn because defendant had no identification. Defendant paid for the room. Mr. Campos had just met Mr. Martinez that week. Mr. Campos was aware that defendant and Mr. Martinez were drug users. Defendant said that when he had money and drugs he always had friends. Mr. Campos did not notice anything unusual about defendant's face or any black eye on the afternoon of March 4, 2005.

At approximately 3 p.m. on March 6, 2005, Deputy John Steele was on patrol. Deputy Steele saw a teal-colored Chevy Astro van which matched the description of an alert regarding an automobile related to a murder. The license plate number on the van matched the one given to Deputy Steele. Deputy Steele confirmed through his computer that the van was suspected of being involved in the murder. Deputy Steele requested

assistance before stopping the van. A felony traffic stop was utilized. Each individual was ordered out at gunpoint. Five individuals were inside: defendant, Mr. Martinez, Ms. Huitron, Maritza Martinez, and Angel Rodriguez. The van was then secured and towed. Deputy Raymond Cardenas assisted in the traffic stop and arrest of the van's occupants. When defendant was being booked into custody, he had a red substance on his left tennis shoe. Deputy Cardenas collected defendant's shoes and clothing, which were eventually given to homicide Detective Jonas Shipe. Detective Cardenas noted on the booking sheet that defendant had a black eye at the time of the March 6, 2005 arrest. Detective Shipe took a deoxyribonucleic acid swab from defendant.

Los Angeles County Sheriff Senior Criminalist Sean Yoshii went to the Cardoza home on March 4, 2005. Mr. Yoshii took several items, including: a green bench; the legs from the green bench; a light-colored stool; a dark-colored stool; and parts of the dark-colored stool that had broken off. Each of the items was tagged with a specific number. Mr. Yoshii also took specimens from Mr. Cardoza's Dodge Ram truck. Samples taken from blood stains on defendant's shoes worn on March 6, 2005 were matched to deoxyribonucleic acid reference samples from Ms. Garcia, Mr. Silos, and Mr. Martinez. One stain involved a mixture of deoxyribonucleic acid with Ms. Garcia and Mr. Martinez included as possible contributors. A second stain involved a deoxyribonucleic acid mixture with Ms. Garcia and defendant as possible contributors. The source of the deoxyribonucleic acid was possibly saliva, skin cells, or blood. No matches were found for latent fingerprints lifted at the scene of the crime. The fingerprints of Ms. Huitron, Mr. Martinez, and Ms. Martinez were identified from latent prints found in the Chevy Astro van.

III. PROCEDURAL BACKGROUND

The information charged defendant with: murder (§ 187, subd. (a)) while engaged in the commission of robbery and burglary (§ 190.2, subds. (a)(17)); first degree residential robbery (§ 211); first degree burglary of an inhabited dwelling (§ 459); elder

abuse resulting in death (§ 368, subd. (b)(1)); grand theft firearm (§ 487, subd. (d)(2)); and grand theft auto. (§ 487, subd. (d)(1).) The information also alleged as to counts 1, 2, 3, and 4 that defendant personally used a deadly and dangerous weapon. (§ 12022, subd. (b)(1).) The alleged victim in counts 1 through 4 was Ms. Garcia. The count 5 victim was Mr. Cardoza.

During discussions regarding jury instructions, the prosecutor indicated that she would proceed on both felony murder and willful, deliberate, and premeditated murder theories. Defense counsel argued that the evidence did not support willful, deliberate, and premeditated murder. The prosecutor argued: ". . . I believe the coroner testified it would have taken some time for death to occur. I think because we have a number of blows, it appears at least it's going to the jury there were a number of types of weapons used that the argument could be made that one had time - - " The trial court interrupted, "But is it the People's theory really the purpose of this act was to commit a robbery or burglary? I just think that it appears to me, based upon the evidence, that it's an 'all or nothing at all' on that felony murder rule. I don't know if there's evidence of premeditation. [¶] He goes there. He tells the people why he wants to go there, he's admitted. What goes on inside? We have no idea other than the fact that there's evidence that some items were stolen. [¶] I'm very uncomfortable instructing on first degree and/or a lesser of second degree. [¶] . . . [¶] . . . And in reading this use note under [CALJIC No.] 8.21, as I indicated earlier: [¶] 'If the facts indicate defendant is guilty of murder in a felony murder or not guilty of anything, it would be error to instruct on murder in the second degree or manslaughter.'" Thereafter, the prosecutor argued: "[T]he prosecution is also permitted to argue alternate theories. Willfulness, premeditation and deliberate [sic] can be formed in a split moment. It is also a concurrent theory that while inside, while during the commission of the robbery and burglary, he begins to kill Ms. Garcia. I believe there's enough evidence to demonstrate that that was a rational decision that was come to."

The trial court then reviewed the holding in *People v. Day* (1981) 117 Cal.App.3d 932, 936, noting: "[T]here was a request that an instruction be given on second degree

murder, voluntary manslaughter, premeditation and malice, as well as lesser-included offenses. [¶] The court declined to do so, the court believing that only the first degree felony murder instructions were applicable. [¶] . . . [¶] And then this case, talking about that, indicates that instructions based on conjecture and speculation are not to be given. [¶] 'The facts in this case clearly establish the question for the jury was felony murder based upon robbery or nothing; there was no other factual basis proffered. [¶] It is not contended that there was no robbery of the victim.'" The court reviewed the facts of this case: "So [defendant] said let's go to, in effect, my aunt's or great aunt's home, kick back, I can get some breakfast, clean up. He goes in. That's all we know about his purpose of going in, other than after the fact, he has possession of certain items that were similar to the items stolen from the victim's home."

During the discussion concerning jury instructions the prosecutor further argued: "I believe the evidence did show that once in the home with his purpose and design to take items that he was in there for at least 30 to 40 minutes. The evidence from Albert Martinez indicated that he saw him getting off of what appeared to be a body from what we've heard now is Ms. Garcia's actual bedroom, that he comes to the door a couple times and still continues on with the assault on Ms. Garcia. [¶] I think at least for premeditated and deliberate that once he is inside, he begins to kill Ms. Garcia to further his intent of robbery and burglary; however, as the court knows, premeditation and deliberation that can be come to in a quick moment. And I believe it was not a very quick killing. It was a brutal attack that took some time to finally complete; and it's during that time, whether it be after blow one, two, three, after what appears to be on top of her, straddling her, that during that time he can form the intent to kill her, have the time to deliberate, have the time to think about it, and that the killing was intentional at that time. I think it's well within what's been shown through testimony, as well as the different various items that are thrown around the room with blood - - the victim's blood on it that it's a reasonable inference the jury can make that he had the time and he did, in fact, intend to kill her after willful thought on the matter." The trial court concluded that the prosecutor's argument involved speculation and declined to give CALJIC No. 8.20 on

willful, deliberate, and premeditated murder. The trial court further refused to give CALJIC Nos.: 8.30 (second degree murder); 8.70 (degree of murder); and 8.71 (doubt whether first or second degree murder). The trial court did instruct on the special circumstances of murder in the commission of robbery or burglary. (CALJIC No. 8.81.17.)

The prosecutor revisited the issue of the instruction on second degree murder after the jury had been instructed but before argument. The prosecutor argued: "Second degree murder is also a theory and the special circumstance only attaches to the felony murder, if as in the court's recitation, if I get that right, the court's recitation that [defendant] went to clean up. And, in effect, if you follow that theory, there's no burglary or robbery, essentially there was a murder and [defendant], if not found guilty of the robbery and burglary, there is no murder. [¶] However, based on our facts, I think the court and defense pointed out the Day case. Our facts are distinguishable from the Day case. That was a robbery of the 7-Eleven case. Somebody was killed in effecting their escape essentially from the robbery. [¶] We have a brutal murder that occurs within the home where [Ms.] Garcia is struck multiple times in the face, arms, torso, hands. We heard from the coroner that death was not instantaneous. Multiple weapons or items in the home were used. [¶] Also, from the evidence in this case, testimony was that about 20 minutes after [defendant] goes in the home, a witness - - Mr. Martinez - - walks up and hears moaning and sees the defendant getting off of something. Presumably by that point in time, 20 minutes, she has already been struck and is down on the ground as evidenced by the blood spatter up on the walls. She is down on the ground now, but not dead, still moaning, still noises being heard. [¶] [Defendant] is interrupted, takes the time, goes to the door at least on two separate occasions to answer, and a third to open the blinds. Goes back. [¶] . . . [¶] In Day there was a stomping to the head where injury was caused. [¶] In this, we have a long, lengthy attack. [¶] I think, clearly, those facts show implied malice, if not express malice was evident when you strike an 86-year-old woman multiple times in the head, at least one of those was hard enough to crack open her skull as the coroner testified that she had a hole from one of the blows. [¶] This

wasn't just an afterthought or a striking to effectuate the escape and robbery. This was a lengthy, brutal attack that took the time to think about to grab instruments. That evidence, clear intent to kill that victim through words, through actions, were shown in this case."

The trial court inquired: "What evidence do I have that there was malice aforethought without premeditation which would lead to a second degree murder instruction?" The prosecutor argued: "Your honor, you're distinguishing motive for the killing from intent. What evidence of malice aforethought?" The prosecutor then reiterated the facts in evidence and argued: "While his motive for going into the home may have been to burglarize or take something from that home, once he is inside the home, he can still form the intent to kill her during the course of that robbery." Finally, the prosecutor argued: "The jury doesn't have a burglary, a robbery or a murder because malice is not being argued to them. It's just special circumstances is just the allegation that attaches to the felony murder." Thereafter, the trial court reiterated its reliance upon the holding of *People v. Day, supra,* 117 Cal.App.3d at page 936, and declined to read the second degree murder instruction.

The jury found defendant guilty of: first degree burglary with a person present; elder abuse resulting in death; and grand theft of a firearm. As noted, the alleged victim in the burglary and elder abuse resulting in death counts was Ms. Garcia. The jury was unable to reach a verdict on the murder charge, the special circumstances and the deadly weapon use allegations. The vote was 11 to 1 in favor of a not guilty verdict on the murder count and the weapon use allegation. A mistrial was declared as to these matters. As noted, the only homicide instructions given to the jury were based on a felony murder theory.

On January 11, 2008, the prosecutor indicated her intention to retry the murder charge against defendant. The trial court reviewed the holding of *People v. Day, supra,* 117 Cal.App.3d at page 936, and *People v. Turner* (1984) 37 Cal.3d 302, 327 (overruled on another point in *People v. Anderson* (1987) 43 Cal.3d 1104, 1115, 1149-1150). After hearing counsels' arguments, the trial court dismissed the count 1 murder charge: "Under

Penal Code section 1385 and in the furtherance of justice, and in viewing the evidence in [a] light most favorable to the prosecution, the court is asking itself could a jury find the defendant guilty beyond a reasonable doubt of felony murder based upon the evidence the jury heard, based upon how our jury reacted to the evidence, I'm satisfied that no jury would find beyond a reasonable doubt that this defendant is guilty of first degree felony murder; and therefore, under Penal Code section 1385, in furtherance of justice, the court does dismiss count 1." The January 11, 2008 minute order states: "The court finds in viewing the evidence in a light most favorable to the prosecution that a jury could not find the defendant guilty beyond a reasonable doubt." The prosecutor indicated that the People would be refiling; presumably a felony complaint or indictment. The trial court responded, "I'm not sure if I make this finding, Ms. Dominguez, that you can refile." The minute order from January 11, 2008, indicates the prosecutor later telephoned to indicate she would not refile the count 1 murder charge.

IV. DISCUSSION

Section 1238 states in pertinent part: "(a) An appeal may be taken by the people from any of the following: [¶] . . . [¶] (8) An order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy." California courts have held: "The People's right to appeal is statutory, and appeals that do not fall within the exact statutory language are prohibited. [Citation.]" (*People v. Salgado* (2001) 88 Cal.App.4th 5, 11, citing *People v. Drake* (1977) 19 Cal.3d 749, 754.) The *Salgado* court further held: "Statutory authorization would not permit an appeal which violated the double jeopardy provision of the state or federal Constitution." (*People v. Salgado, supra,* 88 Cal.App.4th at p. 12.) However, when a mistrial is declared because of a deadlocked jury, the defendant is not deemed to have been placed in jeopardy. (*People v. Smith* (1983) 33 Cal.3d 596, 600-602; *People v. McDougal* (2003) 109 Cal.App.4th 571,

580-581; see also *United States v. Jorn* (1971) 400 U.S. 470, 473-478.) Defendant contends that because the trial court dismissed count 1 based upon the legal insufficiency of the evidence, section 1238, subdivision (a) cannot apply to him based on the double jeopardy provisions of the federal and state conclusions.

In *People v. Hatch* (2000) 22 Cal.4th 260, 271, our Supreme Court held: "The Fifth Amendment of the United States Constitution guarantees that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb . . . .' This clause applies to the states through the due process clause of the Fourteenth Amendment [citation], and protects defendants from *multiple trials.* [Citation.] Article I, section 15, of the California Constitution offers similar protection: 'Persons may not twice be put in jeopardy for the same offense . . . .' . . . [Citation.]" (See *People v. Fields* (1996) 13 Cal.4th 289, 311.) Relying on the holding of *Burks v. United States* (1978) 437 U.S. 1, 18, our Supreme Court in *Hatch* held: "[T]he Fifth Amendment precludes retrial if a court determines the evidence at trial was insufficient to support a conviction as a matter of law. [Citation.] Thus, an appellate ruling of legal insufficiency is functionally equivalent to an acquittal and precludes a retrial. [Citation.] An analogous trial court finding is also an acquittal for double jeopardy purposes. [Citations.]" (*People v. Hatch, supra,* 22 Cal.4th at pp. 271-272; see *Hudson v. Louisiana* (1981) 450 U.S. 40, 42; *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 575.)

In *Hatch*, our Supreme Court also held: "[T]he United States Supreme Court has long held that 'what constitutes an "acquittal" is not to be controlled by the form of the judge's action.' ([*United States* v.] *Martin Linen* [*Supply*] *Co., supra,* 430 U.S. at p. 571.) Rather, appellate courts 'must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.' (*Ibid.*) If a trial court rules the evidence is insufficient as a matter of law, then the ruling bars retrial even if it is patently erroneous or the court has no statutory authority to make it. (See *Sanabria v. United States* (1978) 437 U.S. 54, 64 [a trial court finding of legal insufficiency based on an erroneous foundation is still an acquittal for double jeopardy purposes]; *People v. Valenti* (1957) 49 Cal.2d 199, 203, 209

[a trial court dismissal for legal insufficiency made *without* statutory authorization bars retrial under the California Constitution], disapproved on other grounds in *People v. Sidener* (1962) 58 Cal.2d 645, 647; see also *Fong Foo v. United States* (1962) 369 U.S. 141, 143 [a ruling by a trial court acquitting a defendant bars retrial even if the ruling is 'egregiously erroneous' and the court lacks the power to make the ruling].)" (*People v. Hatch, supra,* 22 Cal.4th at pp. 270-271, original italics.)

However, in *Hatch* our Supreme Court held an appellate court will construe a dismissal as an acquittal for double jeopardy purposes only if there is "clear evidence" the trial judge intended to exercise this power. (*People v. Hatch, supra,* 22 Cal.4th at pp. 271-273.) In *Hatch,* our Supreme Court identified the trial judge's duty: "Specifically, the record must show that the court viewed the evidence in the light most favorable to the prosecution and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt. [Citation.]" (*Id.,* at p. 273; see also *People v. Stitely* (2005) 35 Cal.4th 514, 563.)

Here, the oral pronouncement does demonstrate the trial court found under the evidence, no reasonable trier of fact could find guilt beyond a reasonable doubt. The trial court explained that initially: ". . . I was thinking that: that there was some kind of inconsistency in the verdict until I went back and read count 4, the language of count 4, the elder abuse, beating to death. The language is such - - it goes, for example, 'Having the care and custody of said victim, willfully caused and permitted her to be placed in a situation in which her health was endangered and knew and reasonably should have known that that was the elder,' et cetera, et cetera. [¶] I gather - - we're all speculating; we shouldn't do that, but I gather the jury was saying that in some fashion, in some fashion, obviously, they found [defendant] inside the premises, because that's one of the verdicts. But in some fashion, they felt that he had some responsibility for placing the victim in a position where she would be killed. [¶] And when I read once again the language of [section] 368(b)(1), I could see where they could reason one way, but say that he was not the sole factor involved in the death of the victim. [¶] I wanted to be very candid with both of you. It bothered me tremendously on this issue. [¶] Here's

what the court is going to do: Under Penal Code section 1385 and in the furtherance of justice, and in viewing the evidence in [the] light most favorable to the prosecution, the court is asking itself could a jury find the defendant guilty beyond a reasonable doubt of felony murder based upon the evidence the jury heard, based upon how our jury reacted to the evidence, I'm satisfied that no jury would find beyond a reasonable doubt that this defendant is guilty of first degree felony murder; and therefore, under Penal Code section 1385, in furtherance of justice, the court does dismiss count 1." The clerk's minutes for January 11, 2008 state, "The court finds in viewing the evidence in a light most favorable to the prosecution that a jury could not find the defendant guilty beyond a reasonable doubt."

The statement of reasons in the clerk's minutes is inconsistent in some respects with the oral pronouncement of dismissal. Hence, we must construe the oral pronouncement with the written statement in determining whether the trial court's order meets the requirements imposed by *Hatch*. (*People v. Smith* (1983) 33 Cal.3d 596, 599; see *People v. Hatch*, *supra*, 22 Cal.4th at p. 274, fn. 8.) As noted, the oral pronouncement does use terminology such as "based upon the evidence the jury heard, based upon how our jury reacted to the evidence" and "no jury would find beyond a reasonable doubt that this defendant is guilty of first degree felony murder." In *Hatch*, our Supreme Court stated that use of the term "would" rather than "could" suggests a reweighing of evidence, rather than legal insufficiency analysis. (*Id*. at p. 274.) Further, the oral order relied on the jurors' reactions during trial to the evidence presented then which did not include live testimony by Mr. Martinez. This use of this terminology is consistent with that utilized by the trial court in *Hatch*. In *Hatch*, our Supreme Court held the language used was such that it was impossible to conclude the trial court intended to dismiss for legal insufficiency. (*Ibid*.)

On the other hand, there is language in the written and oral orders which is solely consistent with the intent to dismiss for legal insufficiency. In both the written and oral orders, the trial court expressly stated it was viewing the evidence in a light most favorable to the prosecution; an essential element of a dismissal for legal insufficiency.

(*People v. Hatch, supra,* 22 Cal.4th at pp. 272-273.) Further, in orally framing the issue, the trial court stated it was considering whether any jury "could" find defendant guilty; another hallmark of a dismissal for legal insufficiency. (*Id*. at p. 274.) In its statement of reasons, the trial court used the "could" language. Further, the trial court expressed doubt as to whether the prosecution could refile; additional evidence that the trial count intended to dismiss for legal insufficiency.

In *Hatch*, our Supreme Court held: "Because section 1385 dismissals often are not based on the insufficiency of the evidence as a matter of law, we believe these dismissals should not be construed as an acquittal for legal insufficiency unless the record clearly indicates that the trial court applied the substantial evidence standard. Specifically, the record must show that the court viewed the evidence in the light most favorable to the prosecution and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt. (See [*People v*.] *Lagunas*, [(1994)] 8 Cal.4th [1030,] 1038, fn. 6 [declining to construe the trial court's grant of a new trial as an acquittal for legal insufficiency because the record indicates that the court did not use the "'substantial evidence" standard'].) Absent such a showing, we will assume the court did *not* intend to dismiss for legal insufficiency and foreclose reprosecution. [¶] . . . We merely ask trial courts to make their rulings clear enough for reviewing courts to confidently conclude they viewed the evidence in the light most favorable to the prosecution and found no reasonable trier of fact could convict." (*People v. Hatch*, *supra*, 22 Cal.4th at p. 273, fn. omitted.)

The issue is close. But the trial court made it clear that it was viewing the evidence in a light most favorable to the prosecution. It did so orally and in writing. This is the first element of a dismissal for legal insufficiency identified in *Hatch* . (*People v. Hatch*, *supra*, 22 Cal.4th at p. 273.) The second element of a dismissal for legal insufficiency is a finding that no reasonable trier of fact *could* conclude the defendant is guilty. (*Ibid*.) As to the second element, the trial court used both the "could" and "would" convict language which creates the ambiguous record. At one point, the trial court expressly relied on the evidence and the jurors' reactions to it and concluded no

jury *would* convict on a felony murder theory. On the other hand, the trial court framed the issue in terms of whether a jury could convict. If that was the extent of the trial court's findings, we would agree with the prosecution. That is materially different from the application of the substantial evidence standard. Although not conclusive, at no time did the trial court refer to the substantial evidence test, an element of a dismissal for legal insufficiency referred to in *Hatch*. (*Ibid*.) But in its written statement of reasons in the clerk's minutes, the trial court stated that a jury could not find defendant guilty beyond a reasonable doubt. There was no reference to any particular murder theory in the written statement of reasons. Although the oral ruling is ambiguous, the mandatory written specification of reversal unambiguously is a dismissal for factual insufficiency. The trial court did invoke the language of the substantial evidence test several times. Thus, the weight of the evidence indicates the trial court viewed the evidence in a light most favorable to the prosecution and found no jury could convict defendant. That is a dismissal for legal insufficiency under *Hatch*.

Moreover, the present case is materially dissimilar from the procedural scenario in *Hatch*. In *Hatch*, unlike the present case, the written specification of reasons only stated no reasonable jury *would* convict. (*People v. Hatch*, *supra*, 22 Cal.4th at p. 274.) Further, unlike this case, the written statement of reasons in *Hatch* made no reference to the fact that the trial court had viewed the evidence in a light most favorable to the verdict. (*Ibid*.) Additionally, in *Hatch*, the trial court had inquired about additional evidence and commented on the apparent pro-prosecution bent of the jurors. (*Id*. at p. 266.) None of these factors are present before us. This case is entirely different from *Hatch*.

At oral argument, while arguing there was no strong evidence the dismissal was for legal insufficiency, the prosecution conceded that if the trial court intended to dismiss because the evidence was legally insufficient, then the prosecution cannot appeal. In light of closely related United States Supreme Court authority, we accept the prosecution's concession. (*Smith v. Massachusetts* (2005) 543 U.S. 462, 467; *Smalis v.*

Pennsylvania (1986) 476 U.S. 140, 145-146; *United States v. Martin Linen Supply Co., supra*, 430 U.S. at pp. 575-576.) Therefore, we order dismissal of the appeal.

V. DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

ARMSTRONG, J.

J. KRIEGLER, Concurring.

I concur in the judgment. In my view, the trial court's oral ruling and written statement of reasons under Penal Code section 1385 clearly reflect the intent to dismiss for legal insufficiency of the evidence. The court found that no reasonable jury "could" convict, viewing the evidence in the light most favorable to the prosecution. The court's use of the word "would" on one occasion does not create an ambiguity in view of the totality of the record.

My concurrence is not without reluctance. The trial court started this case down the path to the present conclusion by erroneously failing to instruct on unpremeditated murder of the second degree. Such instructions were clearly warranted by the evidence.

Moreover, the jury's verdicts appear to me as inexplicably inconsistent. Having convicted defendant of burglary and elder abuse, it logically follows that had the jury followed the felony murder instruction, he would have been convicted of that offense as well. I cannot understand how the trial court concluded no jury could reach a verdict on the murder charge, given the verdicts on the burglary and elder abuse offenses. Certainly had defendant been convicted of murder, given the record presented, there would have been no arguable issue on appeal regarding the legal sufficiency of the evidence.

Finally, the trial court's reliance on *People v. Day* (1981) 117 Cal.App.3d 932 for the proposition that the prosecution was not entitled to instructions on unpremeditated murder was entirely misplaced. The facts in *Day* bear no resemblance to this case, and in any event, the prosecution in *Day* did not request instructions on unpremeditated murder.

Despite my misgivings, the fact remains that after declaration of a mistrial on the murder charge based upon a hung jury, the trial court dismissed for legal insufficiency of the evidence. As set forth in the majority opinion, that determination is not reviewable on appeal by the prosecution. (*Smith v. Massachusetts* (2005) 543 U.S. 462, 466-467; *U.S. v. Martin Linen Supply* (1977) 430 U.S. 564, 575.)

KRIEGLER, J.